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Supreme Court
U. S.
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CHARLES ELMORE

No. 53

In the Supreme Court of the United States

OCTOBER TERM, 1930

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

WILLINGHAM LOAN AND TRUST COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 6–9) is reported in 15 B. T. A. 931. The opinion of the Circuit Court of Appeals (R. 13–14) is reported in 36 F. (2d) 49.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 22, 1929. (R. 15.) Petition for certiorari was filed February 21, 1930, and certiorari was granted on April 14, 1930. (R.

16.) (281 U. S. 710.) The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Under the statutes requiring that the assessment of taxes for the fiscal year 1920 shall be made within five years from the time the return was due or made, and for the fiscal year 1921 within four years from the filing of the return, where the returns were filed on March 15, 1921, and March 15, 1922, respectively, are assessments on March 15, 1926, for taxes for each fiscal year made within the respective periods of five and four years prescribed?

STATUTES INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1083:

> SEC. 250. (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, * * *.

Revenue Act of 1921, c. 136, 42 Stat. 227, 265:

> SEC. 250. (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 * * * shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable

years or under prior income, excess-profits, or war-profits tax Acts * * * shall be determined and assessed within five years after the return was filed, * * *.

Revenue Act of 1926, c. 27, 44 Stat. 9, 58 (U. S. C. App., Title 26, Sec. 1057):

SEC. 277. (a) Except as provided in section 278—

* * * * *

(2) The amount of income, excess-profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 * * * shall be assessed within four years after the return was filed, * * *.

(3) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, * * *.

STATEMENT

The taxpayer closed its books of account annually as of May 31st, but made its income and profits-tax returns on the basis of the calendar year. The return for the calendar year 1919 was filed with the Collector on March 13, 1920; the return for 1920 was filed on March 15, 1921; and the return for 1921 was filed on March 15, 1922. Upon examination and audit the Commissioner ruled that the returns should not have been filed upon the calendar-year basis but upon the basis which the taxpayer used in keeping its books. Accordingly in 1924 the Com-

missioner required the taxpayer to file amended returns upon the fiscal-year basis for the years ended May 31, 1920, and May 31, 1921. On March 15, 1926, the Commissioner made jeopardy assessments of additional income and profits taxes for the fiscal years ended in 1920 and 1921. (R. 6–7.)

The taxpayer filed a petition for the redetermination of the deficiency with the Board of Tax Ap- (R. 2), which rendered judgment for the Commissioner (R. 9). The taxpayer then appealed to the Circuit Court of Appeals (R. 10), which reversed the judgment of the Board on the ground that the assessment was made one day late because in computing the period of limitation the Commissioner had excluded the day of the filing of the return (R. 13–14).

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that, in computing the period of limitation provided in Sections 250 (d) of the Revenue Acts of 1918 and 1921 and Section 277 (a) (2) (3) of the Revenue Act of 1926 within which assessment of taxes must be made, the day of the filing of the tax return should be included.

SUMMARY OF ARGUMENT

The pertinent provisions of the three statutes of limitation involved all provide that the amount of tax due under any return shall be determined and assessed within a specified number of years after

the return was filed (or was made). The sole question is whether, in computing the period of limitations, the day upon which the return was filed should be excluded or included. The decision of the Circuit Court of Appeals, which holds that the day upon which the return was filed should be included, because the period ran from an event and not from a specified day, is in conflict with the decisions of this Court and most of the decisions of other courts construing similar statutes. The distinction made by the court below in the instant case between periods running from an event and from a specific day was applied in some of the earlier cases but it has been rejected by the later authorities as unsound. If the statutes in question indicated that the first day should be included, then the case would come within the exception to the rule and the intention of the Congress should be given effect. But the statutes do not indicate such an intention.

ARGUMENT

Sections 250 (d) of the Revenue Acts of 1918 and 1921, *supra,* and Section 277 (a) (3) of the Revenue Act of 1926, *supra,* are substantially alike and provide that the amount of tax due under any return shall be determined and assessed within a specified number of years after the return was filed or was made. It appears that on March 15, 1921, the taxpayer filed a return to which the five-year statute applied; and, on March 15, 1922, a return to which the four-year statute applied. The as-

sessments as to both returns were made by the Commissioner on March 15, 1926. (R. 7.) The sole question is whether or not the assessments were made within the statutory period.

The Circuit Court of Appeals held that the assessments made on March 15, 1926 were one day late, because the statute ran from the *event of filing* and not from the *day of filing*. The court relied upon its decision in *New York Life Ins. Co.* v. *Bullock*, 26 F. (2d) 666, in which it held that the rule with regard to computation of time is that where it is to be made from a specific day the first day is excluded, but where it runs from an event the first day is to be included.

The decision of the Circuit Court of Appeals in the instant case is in conflict with the decisions of other courts construing similar statutes, such as *Sheets* v. *Selden's Lessee*, 2 Wall. 177; *Dutcher* v. *Wright*, 94 U. S. 553; *Smith* v. *Gale*, 137 U. S. 577; *Hicks* v. *National Life Ins. Co.* (C. C. A. 2d), 60 Fed. 690, 693; *Supreme Council American Legion of Honor* v. *Gootee* (C. C. A. 4th), 89 Fed. 941, 945; *Eliot Nat. Bank* v. *Gill* (C. C. A. 1st), 218 Fed. 600, affirming 210 Fed. 933; *Siegelschiffer* v. *Penn. Mut. Life Ins. Co.* (C. C. A. 2d), 248 Fed. 226, 228; *In re Hamilton* (C. C. A. 7th), 29 F. (2d) 281; *Chambers* v. *Lucas* (Ct. App. D. C.), 41 F. (2d) 299; *Bell* v. *West* (C. C. A. 4th) decided October 21, 1930, not yet reported; *In re Anttonen* (D. C. Ore.), 293 Fed. 473; *United States* v. *Senecal* (D. C.

Mass.), 36 F. (2d) 388, 389; *Bemis* v. *Leonard,* 118 Mass. 502; *Seward* v. *Hayden,* 150 Mass. 158; *Laine* v. *Aarnio,* 265 Mass. 374; *McCulloch* v. *Hopper,* 47 N. J. (Law) 189; *Warshaw* v. *De Mayo,* 150 Atl. 214 (Sup. Ct., N. J.); *Cornell* v. *Moulton,* 3 Denio (N. Y.) 12; *Stiegler* v. *Eureka Life Ins. Co.,* 146 Md. 629, 656; *Menges* v. *Frick,* 73 Pa. 137; *Hook* v. *Bixby,* 13 Kan. 164.

In the leading case of *Sheets* v. *Selden's Lessee, supra,* this Court said (p. 190):

> The general current of the modern authorities on the interpretation of contracts, and also of statutes, where time is to be computed from a particular day or a particular event, as when an act is to be performed within a specified period *from* or *after* a day named, is to exclude the day thus designated and to include the last day of the specified period. "When the period allowed for doing an act," says Mr. Chief Justice Bronson, "is to be reckoned from the making of a contract, or the happening of any other event, the day on which the event happened may be regarded as an entirety, or a point of time; and so be excluded from the computation."

In *Taylor* v. *Brown,* 147 U. S. 640, this Court reaffirmed the rule laid down in *Sheets* v. *Selden's Lessee, supra,* which excludes the *terminus a quo,* but held that it was not so absolute as to prevent the inclusion of such *terminus* when necessary to give effect to an obvious intent. See also *Griffith*

v. *Boyert,* 18 How. 158; *Arnold* v. *United States,* 9 Cranch 103; *Owensboro* v. *Owensboro Water Works Co.,* 243 U. S. 166, 171; and *Board of Com'rs* v. *Vandriss* (C. C. A. 8th), 115 Fed. 866. The instant case does not come within this exception because the statutes involved do not specifically indicate that the first day or *terminus a quo* should be included in the computation of the period.

Attention is also called to the fact that an anomalous situation will result unless this case is governed by the rule adopted by this Court in the *Sheets case, supra,* to the effect that in computing periods of time the *terminus a quo,* whether it be a day named or the occurrence of an event, shall be excluded. Sections 250 (d) of the Revenue Acts of 1918 and 1921 prescribe that the tax shall be assessed within five years (or four years, as the case may be) after the return was filed (or was due or was made). The next succeeding clause or sentence provides that no suit or proceeding for the collection of the tax shall be begun "after the expiration of five years after the date when such return was filed" (or was due or was made). This clearly means a period of five full years, the first day of which is the day next after that on which the return was filed. If the decision of the Circuit Court of Appeals in the instant case is sound and a distinction is recognized in the rule of computation of periods of time started from an event and

those started from a specified day, then the Revenue Acts define two different periods of limitation within which the Commissioner might proceed with the enforcement of the same tax liability. Under the rule adopted by the court below, the assessments of the taxes involved in the instant case are barred by the statute of limitations, but a suit or proceeding for collection instituted on the day on which the assessments were here made would not be barred. If the court below has correctly construed the applicable provisions of the Revenue Acts, there was still time for instituting a suit for the collection of taxes although the time for assessment was barred. Certainly Congress could not have intended any such anomalous result, and we submit that the language of the statutes in question does not require any such construction.

CONCLUSION

The decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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